MSS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2063 OF 2006

M/s. CONNECTWELL INDUSTRIES)
PVT. LTD., having their office)
at D-14, Phase II, MIDC,)
Dombivili-421204, Maharashtra) .. PETITIONERS

Versus

1. UNION OF INDIA)
through the Ministry of)
Finance,South Block,New Delhi

2. RECOVERY OFFICER,)
Debt Recovery Tribunal - III,
5th Floor, Scindia House,)
N. M. Marg House, Ballard)
Estate, Mumbai 400 038)

3. MAHARASHTRA INDUSTRIAL)
DEVELOPMENT CORPORATION,)
having their Regional office)
at office Complex Building)
1st Floor, Near Check Naka,)

Wagle Estate, Thane)

4. THE TAX RECOVERY OFFICER,)
Range 1, Kalyan Rani Mansion)
Murbad Road, Kalyan 421 301) .. RESPONDENTS

Mr. Virag Tulzapurkar, Sr. Advocate i/b M/s. Wadia Ghandy & Co. for petitioners
Mr. Y. R. Mishra with Mr. D. A. Dubey for Respondent No. 1
Ms. Deepa Chavan with Mr. Sandesh Shukla i/b M/s. Navdeep Vora Associates for Respondent No. 3.
Mr. S.R. Chauhan with Mr. A. N. Kotangale for Respondent No. 4.

CORAM: **SWATANTER KUMAR, C.J**. &
SMT. RANJANA DESAI, J.

DATE ON WHICH THE JUDGMENT
RESERVED : 12TH JULY, 2007

DATE ON WHICH THE JUDGMENT
DELIVERED:21ST A**UGUST,2007**

JUDGMENT: (Per Smt. Ranjana Desai, J.)

. The petitioners are a registered company having their registered office at D-14, Phase II, MIDC, Dombivili 421204, Maharashtra. In this petition filed under Article 226 of the Constitution of India, the petitioners are seeking an order restraining respondent 4, the Tax Recovery Officer, Range 1, Kalyan from enforcing the attachment made under the Income Tax Act for the recovery of dues.

2. The case of the petitioners as disclosed from the petition is that the Union Bank of India had filed Recovery Proceeding No. 90 of 2002 for execution of Recovery Certificate in Original Application No. 1836 of 2000, drawn up by the Presiding Officer, Debts Recovery Tribunal No. III (DRT) Mumbai for a sum of Rs.4,77,89,430-20 from the certificate debtors, M/s. Brown Pharma India Ltd. ("BPIL" for short) as per the Recovery Certificate.

3) Pursuant to the direction of the Recovery Officer, the movable and immovable properties situated at plot No. D-11, MIDC Dombivili belonging to the Certificate Debtor BPIL was put up for public auction on 28/9/04. By their letter dated 8/12/04 the petitioners submitted their offer

for the purchase of the said property at Rs.22,00,000/- for immovable property and Rs.1,00,000/- for movable property. The said offer was accepted by the Recovery Officer, respondent 2 herein. On 9/12/04 the said property was sold to the petitioners by a private treaty.

4. A sale certificate dated 14/1/05 was issued by the DRT in favour of the petitioners. It is noted in the said certificate that no application under Rule 60, 61 or 62 of the Second Schedule of the Income Tax Act, 1961 ("the said Schedule" for convenience) had been received for setting aside the sale as on the date of issuance of the certificate by DRT. The said sale certificate has been registered with the Sub-Registrar Office, Kalyan. By their letter dated 14/1/05, the petitioners requested the 2nd respondent, the Recovery Officer, DRT to handover possession of the said plot to them.

5. It appears that on 17/6/03 the 4th respondent i.e. the Tax Recovery Officer, Range 1 Kalyan had attached the said plot under Rule 48 of the said Schedule in recovery proceedings initiated by Income Tax Department, Kalyan, against BPIL, who

had created mortgage in respect of the said plot in 1998.

6. The 3rd respondent i.e. MIDC by its letter dated 23/3/06 addressed to the 2nd respondent, the Recovery Officer of the DRT stated that the 4th respondent had by his letter dated 6/3/06 informed the 3rd respondent that the Income Tax Department had attached the said plot on 17/6/03.

7. The petitioners addressed letter to the MIDC, respondent 3 to transfer the said plot purchased by them in the auction conducted by the Recovery Officer, DRT respondent 2, in their favour. The petitioners also addressed a letter to the 2nd respondent. The MIDC by its letter dated 19/6/2006 has called upon the petitioners to obtain no objection certificate from DRT.

8. According to the petitioners, they have paid the entire sale proceeds. They are in possession of the said plot. But they have not received any positive response as regards their request for transfer of the said plot in their favour from the respondents. It is in these circumstances that the petitioners have approached this court.

9. We have heard Mr. Tulzapurkar, learned counsel appearing for the petitioners, Mr. Mishra, learned counsel for respondent 1, Mrs. Deepa Chavan, learned counsel for respondent 3 and Mr. Chauhan, learned counsel for respondent 4. We have perused the affidavits filed by the 3rd & 4th respondents and the rejoinder filed on behalf of the petitioners.

10. Mr. Tulzapurkar contended that the petitioners have paid the entire purchase price and they are in possession of the said plot. The petitioners are bonafide purchasers and hence action of the 3rd respondent in not issuing No Objection to the sale is unjustified particularly when the certificate of sale is duly registered. He submitted that the said property is purchased by the petitioners in auction sale. Despite publication of the auction notice in the newspapers no application under Rule 60, 61 or 62 of the said schedule had been received by the Recovery Officer, DRT and this fact is stated in the Sale Certificate dated 14/1/2005.

11. Mr. Tulzapurkar submitted that the provisions

of the Income Tax Act and the Rules on which the respondents are placing reliance have no application to the facts of this case. He submitted that Rule 2 of the said schedule speaks of notice to a defaulter. The petitioners are bonafide purchasers. Notice under Rule 2 was issued to the defaulter BPIL on 11/2/2003. Rule 16 applies to private alienations. Mr. Tulzapurkar submitted that it is private alienation after service of notice under Rule 2 which is prohibited under Rule 16. He pointed out that in this case the notice was served on BPIL. In any case after 11/2/2003 when the notice was served there was no private alienation. The petitioners purchased the said property in a public auction conducted in execution proceedings by respondent 2, pursuant to the order of the DRT dated 18/4/02. Therefore, Rule 16 has no application in this case. Mr. Tulzapurkar contended that since the petitioners have purchased the said property from respondent 2 at the behest of the secured creditor for valuable consideration without notice of any alleged attachement by the Income Tax Department, respondent 4, being an unsecured creditor cannot obstruct the transfer.

12. In support of his submissions, Mr. Tulzapurkar relied on a judgment of the learned Single Judge of this court in **P. Kumar & Co. and Anr. v. Union of India and Anr., ITR Vol. 190, 672.** On the basis of this judgment, he submitted that at the time of sale no demand of tax was pending against BPIL. Hence the property in the hands of the petitioners cannot be attached for recovery of tax dues of BPIL . Mr. Tulzapurkar submitted that in the circumstances, this court should grant the petitioners' prayers.

13. Mr. Chauhan, the learned counsel for the 4th respondent submitted that the Income Tax Department, Kalyan had initiated recovery against BPIL for realization of dues of more than Rs.20 lacs. He drew our attention to Exh.-A to the affidavit of Mrs. Majas, Tax Recovery Officer, Kalyan giving details of the said dues. The immovable property sold to the petitioners was attached under Rule 48 of the said schedule on 17/6/03 after giving notice to BPIL under Rule 2 of the said Schedule. He submitted that as per Rule 16(2) of the said schedule any transfer of property by a defaulter assessee is void as against the claim of the Income Tax Department and hence the

petitioners are not entitled to get any reliefs.

14. From the petition and the various affidavits following facts emerge. Union Bank of India had initiated recovery proceedings against BPIL for recovery for its outstanding amount in the D.R.T. D.R.T. directed issuance of Recovery Certificate on 18/4/2002. Recovery Certificate was accordingly drawn up. Pursuant to the direction of Recovery Officer respondent 2 herein, the said property was put up for auction after issuing public notice. On 9/12/2004, the said property was sold to the petitioners by a private treaty. A sale certificate dated 14/1/05 is issued by the DRT in favour of the petitioners. Much prior to the sale of the said property in favour of the petitioners, respondent 4 had on behalf of Income Tax Department, Kalyan, initiated recovery proceedings against BPIL for realization of it’s dues. Notice under Rule 2 of the said schedule was issued to BPIL on 11/2/2003. Respondent 4 had attached the said property under Rule 48 of the said schedule on 17/6/2003.

15. The question is whether the petitioners who claim to be bonafide purchasers and who have

purchased the said property from respondent 2 in the auction sale as per the order of DRT for valuable consideration are entitled to have the property transferred to their name though attachment is levied on the said property by the Income Tax Department.

16. The said schedule provides for procedure for recovery of tax. Rule 2 thereof reads as under:

> "**Issue of notice**.
>
> 2. When a certificate has been drawn up by the Tax Recovery Officer for the recovery of arrears under this Schedule, the Tax Recovery Officer shall cause to be served upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within fifteen days from the date of service of the notice and intimating that in default steps would be taken to realize the amount under this Schedule."

This Rule provides for a notice to the defaulter after a certificate is drawn up by the Tax Recovery

Officer for the recovery of arrears. Rule 16 thereof reads thus;

> **"Private alienation to be void in certain cases.**
>
> 16. (1) Where a notice has been served on a defaulter under rule 2, the defaulter or his representative in interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him except with the permission of the Tax Recovery Officer, nor shall any civil court issue any process against such property in execution of a decree for the payment of money.
>
> (2) Where an attachment has been made under the Schedule, any private transfer or delivery of the property attached or of any interest therein and any payment to the defaulter of any debt, dividend or other, moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment."

17. It is clear, therefore, that after notice under Rule 2 is served on the defaulter the defaulter or his representative in interest cannot deal with the property belonging to him except with the permission of the Tax Recovery Officer and under Sub-rule (2) of Rule 16, if any attachment has been made under this schedule any private transfer or delivery of the property or of any interest therein contrary to such attachment is void against all claims enforceable under the attachment.

18. In this case notice under Rule 2 was issued to BPIL on 11/2/2003. The said immovable property was attached under Rule 48 of the said schedule on 17/6/03 vide ITCP-16. Form No. ITCP 16 annexed to the affidavit of the Tax Recovery Officer states that the defaulter BPIL had failed to pay a sum of Rs.20,46,813/- payable under certificate dated 11/2/2003 and hence the said property is attached. The sale in favour of the petitioners has taken place on 9/12/2004 and the sale certificate is issued on 14/1/05. Therefore, as per Rule 2 read with Rule 16 of the said Schedule the said sale is void.

19. We are not impressed by Mr. Tulzapurkar's contention that because the sale was at the instance of the 2nd respondent under the orders of the DRT, it will not be covered by Rule 16. The defaulter could not have sold the property after receipt of notice under Rule 2 and after attachment of the property by the Income Tax Department. Therefore, in the circumstances of the case even respondent 2 could not have ordered the sale of the said property. It is not possible for us to set aside the attachment in this manner. Attachment levied by the Income-Tax Department cannot cease to operate because of subsequent sale. Dues of the Department must be paid. Attachment will continue to operate so long as the dues are not paid and the fact that property has changed hands will, in our opinion, make no difference.

20. In our opinion, the reliance placed by Mr. Tulzapurkar on the judgment of this court in **P. Kumar's case (supra)** is misplaced. In that case the petitioners therein had entered into an agreement of sale dated 18/8/1984 with one company. Possession was handed over to the petitioners. The petitioners and the company jointly filed Form No.

37EE before the Competent Authority under Section 269 AB(2) of the Income Tax Act. In March 1987, the Income Tax Department attempted to attach the said property. Petitioners wrote a letter to the Income Tax Department stating that they had purchased the premises without notice of any proceedings against the said company in respect of assessment year 1983-84. The company had filed return for the assessment year 1983-84 on 27/2/84, though the date of completion of the assessment was not indicated.

21. On facts before it a learned Single Judge of this court held that the petitioner and the said company had jointly filed Form No. 37EE in the office of the Competent Authority. The assessment of the said company was not completed until March, 1986 and hence no demand could, thus be pending against the said company at the relevant time. This court observed that the petitioners therein had filed the requisite forms and, therefore, it was for the department to raise objection against the purchase of the premises from the said company. This court observed that affidavit in reply was also not filed by the department. In the circumstances, this court quashed the notice of

attachment.

22. In this case, the Income Tax Department has filed affidavit. The petitioner has not chosen to make BPIL party. It is not even averred in the petition that no demand was pending against BPIL. Mrs. Majas, the Tax Recovery Officer of the Income Tax Department has stated in her affidavit that the Income Tax Department had initiated recovery proceeding against BPIL for realization of dues of more than Rs.20 lacs. She has annexed to her affidavit a table giving all particulars about the assessment years, demand to be recovered, date of service of notice and dates of payment. We are not in a position to record a finding that in the facts of this case, there was no pending demand, particularly when there is no specific challenge raised in the petition. In our opinion, the judgment of this court in **P. Kumar's case** will have to be confined to its own facts.

23. In the circumstances, we are of the opinion that there is no merit in this writ petition. The writ petition will have to be therefore, dismissed and is dismissed accordingly. Dismissal of this writ petition shall, however, not come in the way

of the petitioners in approaching the Income Tax Department for appropriate reliefs.

CHIEF JUSTICE.

SMT. RANJANA DESAI, J.